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MYGAZ SDN BHD v. DIRECTOR OF GAS DISTRIBUTION SARAWAK, MINISTRY OF UTILITY AND TELECOMMUNICATION SARAWAK & ORS

HIGH COURT SABAH & SARAWAK, KUCHING
FARIDZ GOHIM ABDULLAH JC
B [JUDICIAL REVIEW NO: KCH-25-18-12-2023]
29 SEPTEMBER 2024

Abstract – *Courts are not inclined to grant judicial review against a decision made in pursuance of a policy decision of the Government unless such decision is inconsistent with the Constitution or the laws or it is tainted with irrationality or abuse of power. If judicial review is still granted against such a decision, it will be against the doctrine of separation of powers as upheld by our system of Government.*

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CIVIL PROCEDURE: *Judicial review – Application – Application to quash decision of Director of Gas Distribution ('Director') – Licenses with respect of supply and retail of subsidised and unsubsidised liquefied petroleum gas in Sarawak only granted renewal for duration of 30 June 2023 until 30 November 2023 – Whether application ought to be allowed – Whether applicant had legitimate expectation* E *renewal would be granted – Whether Director acted ultra vires and in bad faith – Whether Director failed to exercise its statutory powers in accordance with object of Distribution of Gas Ordinance 2016 (Sarawak) (Cap 72) – Rules of Court 2012, O. 53 r. 3(2)*

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The applicant, a subsidiary of Siamgas and Petrochemicals Public Company Limited, was a company involved in the business of distributing liquefied petroleum gas ('LPG') in Sarawak. The first to third respondents, respectively, were the Director of Gas Distribution of Sarawak, the Minister of Ministry of Utility and Telecommunication of Sarawak and the said Ministry itself ('MUT'). The applicant had been granted licenses under the G Distribution of Gas Ordinance 2016 (Sarawak) (Cap 72) ('Ordinance') with respect of the supply and retail of subsidised and unsubsidised LPG in Sarawak. On or around 2 May 2023, the applicant applied to MUT to renew the said licenses. The applicant was granted the renewal sought, however, as per License Nos. 00942 and 00948 ('licenses'), the renewal granted was H imposed with the terms of only for the duration of 30 June 2023 until 30 November 2023. This prompted the applicant to file an appeal against the said decision. Thereafter, MUT decided to reject the appeal and maintain its decision ('impugned decision'). Aggrieved, the applicant filed the present application for judicial review against the impugned decision. Leave was I subsequently granted for the hearing of, among others, the following reliefs, pursuant to O. 53 r. 3(2) of the Rules of Court 2012 ('ROC'): (i) an order

of *certiorari* to quash the impugned decision; (ii) a declaration that the impugned decision was illegal, null and void; and (iii) an order of *mandamus* to direct the respondents to issue, renew or extend the expiry of the licenses. In support of the application, the applicant, *inter alia*, had submitted the following: (i) the impugned decision was vitiated by the fact that there was, at all material times, a legitimate expectation by the applicant that the licenses would be renewed; (ii) in arriving at the impugned decision, the respondents had acted *ultra vires* and in bad faith; (iii) the impugned decision was an unreasonable exercise of statutory powers as the respondents had not taken into account relevant factors, such as the respondents had failed to exercise its statutory powers in accordance with the object of the Ordinance, and it had been exercised to defeat the policy and object of the Ordinance to force the applicant out of the Sarawak market.

Held (dismissing application with costs):

(1) The impugned decision was made following the policy decision or direction of the State Government of Sarawak ('State Government') to accord more opportunities for Sarawakian or Sarawak companies to be involved in the gas distribution business in Sarawak ('policy decision'). Consistent with the policy decision, it was decided that the distribution of subsidised LPG should be controlled through Petroleum Sarawak Bhd (PETROS), a State Government company that manages the subsidies for LPG to household consumers. As it was the State Government's policy, the policy decision was implemented through the licensing process and procedure in which the first respondent, in his sole and exclusive discretion, was empowered to regulate under the Ordinance. Therefore, unless the policy decision was inconsistent with the Constitution and the laws or arbitrary or irrational or abuse of power, the court would not interfere with it. Considering that the impugned decision hinged on matters relating to the policy decision, this court would dissuade itself from entering the realm which belonged to the Executive. (paras 59-60 & 64-65)

(2) The courts must be wary of unduly extending its judicial arms to policy matters exclusively within the Executive domain. Unwarranted usurpation and transgression by the Judiciary into the realm of Executive and *vice versa* would bring about disrepute to our system of Government which upholds the separation of powers between the three main components *vis-à-vis* the Executive, Legislature and Judiciary. Whether or not the court should interfere depended on the facts and circumstances of each case. In the instant case, the court was inclined to agree that, as the impugned decision hinged on the policy decision, it was not amenable to judicial review. (paras 67 & 68)

(3) The allegation that the first respondent had acted on the dictation of the State Secretary or the State Government, was not specifically pleaded by the applicant in its statutory statement or affidavit-in-support. Under O. 53 r. 3(2) of the ROC, it is a requirement for the statutory statement to be supported by a statement setting out grounds on which the relief is sought from the court. The said ground of challenge therefore should not be allowed to be relied on by the applicant in this application. (paras 69 & 70)

(4) The existence of the alleged legitimate expectation was not supported by any factual evidence or legal basis. There is no specific provision under the Ordinance which provides as a matter of right, for renewal of the licenses upon its expiry. Based on s. 8(1) of the Ordinance, the first respondent, upon issuing the license may impose terms and conditions. By not renewing a license, the first respondent was exercising its discretionary power provided under the Ordinance and therefore could not be said to have breached the same. Hence, there was no issue of *ultra vires* of s. 8 of the Ordinance by the first respondent. (paras 72 & 73)

(5) The applicant itself had failed to discharge the burden of establishing that there was a representation by the respondents, the Federal Ministry or officials that the applicant's license to sell LPG including subsidised LPG (which was for a fixed term not exceeding five years), would be renewed. Hence, it was agreed that the impugned decision was not *ultra vires* or was acted in bad faith. The first respondent did not exercise his statutory powers to defeat the policy decision and the object of the Ordinance. Moreover, the impugned decision was also not illegal, null and void as it was made consistent with the policy decision of the State Government and in accordance with the statutory powers provided under the Ordinance. Premised on these, the application for judicial review was dismissed with costs of RM30,000 to the respondents. (paras 76-78)

Case(s) referred to:

Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1947] 2 All ER 680 ***(refd)***

Council Of Civil Service Unions v. Minister For The Civil Service [1985] AC 374 ***(refd)***

Datuk Bandar Kuala Lumpur v. Perbadanan Pengurusan Trellises & Ors And Other Appeals [2023] 5 CLJ 167 FC ***(refd)***

Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia [2013] 2 CLJ 1009 FC ***(refd)***

Hotel Sentral (JB) Sdn Bhd v. Pengarah Tanah Dan Galian Negeri Johor, Malaysia & Ors [2017] 6 CLJ 161 CA ***(refd)***

Karpal Singh Ram Singh v. Ketua Hakim Negara [2011] 4 CLJ 179 HC ***(refd)***

Khoo Ah Imm & Ors v. Datuk Bandar Kuala Lumpur & Anor [1997] 3 CLJ 519 CA ***(refd)***

Law Pang Ching & Ors v. Tawau Municipal Council [2010] 2 CLJ 821 CA ***(refd)***
Menteri Tenaga, Air Dan Komunikasi & Anor v. Malaysian Trade Union Congress & Ors [2012] 9 CLJ 858 CA ***(refd)***
Ong Ah Hooi v. Pentadbir Tanah Larut, Matang Dan Selama & Anor [2017] 6 CLJ 262 CA ***(refd)***
P Patto v. Chief Police Officer, Perak & Ors [1986] 2 CLJ 13; [1986] CLJ (Rep) 208 SC ***(refd)***
Padfield v. Minister Of Agriculture, Fisheries And Food [1968] AC 997 ***(refd)***
Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] CLJU 143; [1978] 1 LNS 143 FC ***(refd)***
R v. North And East Devon Health Authority, Ex Parte Coughlan (Secretary Of State For Health And Another Intervening) [2000] 3 All ER 850 ***(refd)***
Suriwong International Sdn Bhd v. Menteri Kewangan, Malaysia & Ors [2023] CLJU 126; [2023] 1 LNS 126 HC ***(refd)***
V Paul Raj Chelladurai v. Jabatan Telekom (M) Bhd [2000] 4 CLJ 882 CA ***(refd)***

Legislation referred to:
Distribution of Gas Ordinance 2016 (Sarawak) (Cap 72), ss. 3, 7(f), (g), 8(1)
Interpretation Ordinance 2005 (Sarawak) (Cap 61), s. 24(1)
Rules of Court 2012, O. 53 rr. 2(4), 3(2)

For the applicant - Alvin Yong & Shirleen Ong; M/s Alvin Yong Advocs
For the respondents - JC Fong, Voon Yan Sin, Simsom Sim Zhan Yao & Khairul Kadir Abdul Kadir; State Attorney General's Chambers, Sarawak

Reported by Syamim Ariffin

JUDGMENT

Faridz Gohim Abdullah JC:

Introduction

[1] This is an application for judicial review filed by the applicant, MyGaz Sdn Bhd. On 22 January 2024, leave to apply for judicial review was granted for the hearing of the following reliefs as stated in the statutory statement filed pursuant to O. 53 r. 3(2) of the Rules of Court 2012 ("the ROC 2012").

(i) an order of *certiorari* to quash the decision of the respondents published and notified to the applicant, as contained in the letter dated 29 September 2023 ("the impugned decision");

(ii) a declaration that the impugned decision is illegal, null and void;

(iii) an order of *mandamus* directing the respondents to issue, renew or extend the expiry of the license for retail of subsidised liquefied petroleum gas (LPG) to the applicant;

(iv) the costs of and/or incidental to this application be paid by the respondents to the applicant; and/or

(v) such further, alternative, consequential or other relief as this Honourable Court deems fit and proper in the circumstances.

[2] The grounds for reliefs pleaded in the statutory statement are as follows:

(i) the impugned decision was vitiated by the fact that there was at all material times a legitimate expectation by the applicant that the license (for the retail of subsidised LPG) would be renewed;

(ii) the respondents acted *ultra vires* and in bad faith in making the impugned decision;

(iii) the impugned decision was an unreasonable exercise of power as the respondents had taken into account irrelevant considerations and did not take into account relevant factors such as:

(a) all conditions to obtain renewal have been met;

(b) the applicant, having made substantial investments in the LPG supply chain in Sarawak, has legitimate expectation to continue its business in the supply and retail of subsidised LPG in the Sarawak market;

(c) the applicant's participation in gas distribution is beneficial to the general public in ensuring smooth and efficient supply of LPG;

(d) the respondents had failed to exercise its statutory power in accordance with the object of the Distribution of Gas Ordinance 2016 ("the Ordinance"). The statutory powers in arriving at the decision was therefore in effect exercised to defeat the policy and object of the Ordinance and to force the applicant out of the Sarawak market.

[3] The application for judicial review is supported by:

(i) the applicant's affidavit affirmed by Pakamard Boonsawat dated 12 December 2023 (encl. 2); and

(ii) the affidavit in reply affirmed by Pakamard Boonsawat dated 27 February 2024 (encl. 18).

[4] The respondents have filed the following affidavits to oppose the application:

(i) the affidavit in opposition 1 affirmed by Syed Mohamad Fauzi Shahab dated 2 February 2024 (encl. 15);

(ii) the affidavit in opposition 2 affirmed by Victor Maiyor dated 2 February 2024 (encl. 16);

(iii) the affidavit in opposition 3 affirmed by Syed Mohamad Fauzi Shahab dated 15 March 2024 (encl. 20); and

(iv) the affidavit in opposition 4 affirmed by Victor Maiyor dated 15 March 2024 (encl. 21).

[5] On 3 July 2024, this court dismissed the applicant's application for the reliefs sought through this judicial review. Aggrieved by the decision of this court, the applicant had filed an appeal to the Court of Appeal.

[6] Below are the grounds for my decision.

Brief Background Facts

[7] The applicant is a private limited company incorporated under the laws of Malaysia and is a subsidiary of Siamgas and Petrochemicals Public Company Limited. Siamgas and Petrochemicals Public Company Limited is listed on the stock exchange of Thailand and is one of the biggest LPG suppliers in Southeast Asia.

[8] The first respondent is the Director of Gas Distribution appointed under s. 3 of the Ordinance.

[9] The second respondent is the Minister of the Ministry of Utility and Telecommunication Sarawak (MUT) who has responsibility for distribution of gas under the Ordinance.

[10] The third respondent is the Ministry of Utility and Telecommunication Sarawak ("MUT") in charge of water supply, electricity supply, gas distribution and telecommunication services.

[11] The applicant was granted licenses under the Ordinance in respect of the supply and retail of subsidised and unsubsidised gas (LPG) in Sarawak.

[12] On or around 2 May 2023, the applicant submitted an application to MUT to renew its licenses for retail and supply of subsidised LPG and unsubsidised LPG. The applicant was granted a renewal in the form of License No. 00942 and No. 00948. On the face of these two licenses, it is stated:

> Duration of license: from 30/6/2023 to 29/6/2024.

[13] On or around 7 July 2023, the applicant received letters dated 26 June 2023 from the Gas Distribution Division of MUT (under the hand of the Acting Director) which among others, the Director purported to impose the following terms for the retail and supply licenses for subsidised LPG:

(i) License for Retail of Subsidised LPG: 30 June 2023-30 November 2023;

(ii) License for Supply of Subsidised LPG: 30 June 2023-30 November 2023.

[14] By a cover letter dated 25 July 2023 addressed to the Director of the Gas Distribution Division of MUT, the applicant had enclosed an appeal letter dated 20 July 2023 ("appeal letter") to appeal on the terms and conditions for the licenses issued in respect of the retail and supply of subsidised LPG.

[15] By a cover letter dated 27 September 2023 addressed to the Director of the Gas Distribution Division of MUT, the applicant had enclosed:

(i) a follow-up letter on the appeal letter;

(ii) documents for renewal of License No. 00942 retail of subsidised LPG; and

(iii) documents for renewal of License No. 00948 supply of subsidised LPG.

[16] By a letter dated 29 September 2023, the Gas Distribution Division of MUT rejected the applicant's appeal and decided to maintain the terms and conditions that the licenses will be for the period of 30 June 2023 until 30 November 2023. The decision as stated in the letter dated 29 September 2023 at exh. A1 to AIS (encl. 2), which reads:

> The appeal has been considered and we decided to maintain the terms and conditions where the licenses will be for a period of 30 June, 2023 until 30 November 2023. We appreciate that your company will continue to play an active role that aligns with the aspiration of the Sarawak gas industry.

Applicant's Submission

[17] The applicant filed these proceedings for judicial review as it was aggrieved by the impugned decision of the respondents not to renew the applicant's licenses beyond 1 December 2023 as contained in the letter dated 26 June 2023 and reinforced in the letter dated 29 September 2023. In particular, the applicant intends to rely on the following grounds:

(i) the respondent had acted *ultra vires* in making the decision;

(ii) the decision is the product of patent illegality, whereby the statutory decision-maker was simply acting under the dictation of the State Executive;

(iii) the respondent had used its statutory powers in bad faith and for improper purposes;

(iv) the decision reached by the respondent is unreasonable in the circumstances;

(v) the applicant has a legitimate expectation that its licenses continue to supply the subsidised LPG beyond 1 December 2023; and

(vi) the respondent's failure to respect and recognise the applicant's legitimate expectation is so unfair such as to amount to an abuse of power.

The Decision Is Ultra Vires And Tainted By Illegality

[18] The applicant submits that the first respondent had patently acted *ultra vires* ss. 7 and 8 of the Ordinance in arriving at its impugned decision. Under s. 8 of the Ordinance, the power to issue a license and to stipulate any terms

and conditions therein lies in the sole and exclusive discretion of the first respondent, *ie*, the Director. It was submitted in this case, that the decision to impose the impugned terms was not the product of the Director's own mind but the product of dictation from the State Secretary as stated in an internal "memorandum from the Director of Economic Planning Unit to State Director of Gas Distribution" ("the memorandum").

[19] Thus, the applicant contends that the decision was made by the State, namely, that the retail and supply of gas was to be monopolised by a company known as PETROSNiaga. It is trite law that the person in whom a certain statutory power is vested must exercise his own decision and must not act upon the dictation of another, otherwise, the so-called decision made is *ultra vires* and illegal in law (refer MJ Jain, *Administrative Law,* 4th edn and case of *P Patto v. Chief Police Officer, Perak & Ors* [1986] 2 CLJ 13; [1986] CLJ (Rep) 208).

The Respondent Had Used Its Statutory Powers In Bad Faith, For Improper Purposes, And/Or In Breach Of Natural Justice

[20] The applicant submitted that the respondents' decision is made in bad faith. This element of bad faith is clearly borne out in the letter from PETROSNiaga to "whom it may concern". In the letter to all the Bulk LPG or unsubsidised gas customers, PETROSNiaga announced to the customers that the applicant will not survive without the license to supply or/and retail subsidised gas.

[21] It is an admitted fact that PETROS is a State Government company and that PETROS is the majority shareholder of PETROSNiaga. It follows that the respondents have a vested interest in the business success of PETROSNiaga. The State decided not to renew the license (and dictated that the first respondent shall give effect to its decision), so as to enable the State's own corporation to monopolise the supply of subsidised gas (for case regarding conflict of interest or bias, reference is made to the case of *Datuk Bandar Kuala Lumpur v. Perbadanan Pengurusan Trellises & Ors And Other Appeals* [2023] 5 CLJ 167).

[22] Further, the applicant submitted that pursuant to this issue, two consequences will follow. Firstly, the existence of a conflict of interest and/or bias afflicting the impugned decision would by and of itself warrant the quashing thereof. It is important to note that the memorandum was not known to the applicant, and was only disclosed by the first respondent in the course of these proceedings. Secondly, this will further substantiate the fact that the discretion of the Director was exercised for extraneous purposes, which also warrants the quashing of the impugned decision.

[23] On the issue of an extraneous purpose, it was submitted that it is implicit from the content of the letter that the impugned decision was made to eject the applicant out of the LPG market in Sarawak so as to enable PETROSNiaga to secure its monopoly. The applicant submits that this is a classic case of an extraneous purpose that amounts to bad faith.

(Refer cases of *Padfield v. Minister Of Agriculture, Fisheries And Food* [1968] AC 997, *Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] CLJU 143; [1978] 1 LNS 143; [1979] 1 MLJ 135 and *Menteri Tenaga, Air Dan Komunikasi & Anor v. Malaysian Trade Union Congress & Ors* [2012] 9 CLJ 858; [2013] 1 MLJ 61).

The Impugned Decision Reached By The Respondents Is Unreasonable In The Circumstances

[24] It is settled law that a decision-maker must take into account every relevant consideration, and that it must not take into account any irrelevant consideration (refer *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1947] 2 All ER 680 and *Ong Ah Hooi v. Pentadbir Tanah Larut, Matang Dan Selama & Anor* [2017] 6 CLJ 262; [2017] 2 MLJ 256).

[25] It was submitted that the respondents had completely disregarded the following material considerations in making its impugned decision:

(i) the applicant had a legitimate expectation to continue its business in the supply and retail of subsidised LPG in the Sarawak market in line the substantial investment made in the LPG supply chain in Sarawak.

(ii) all conditions to obtain a renewal of the license have been met.

(iii) the applicant's participation in the gas distribution chain will be beneficial to the general public in ensuring smooth and consistent supply of LPG.

The Applicant Has A Legitimate Expectation That Its Licenses To Supply Subsidised LPG Will Be Renewed

[26] The applicant contended that it has a legitimate expectation that its licenses will be renewed by the respondent to allow the applicant to continue supplying subsidised LPG in Sarawak. To borrow the words of the learned Lord Diplock (refer to the case of *Council Of Civil Service Unions v. Minister For The Civil Service* [1985] AC 374), the applicant's legitimate expectation arises from a regular practice which it may reasonably expect to continue. The regular practice in question is the applicant has been renewed on yearly basis since it began operation in 2013, first by the Ministry of the Domestic Trade and Consumer Affairs (pre-2016) and subsequently by the respondent (post-2016). Thus, the applicant's right to supply subsidised LPG had not been interrupted for the last ten years (refer also case of *Law Pang Ching & Ors v. Tawau Municipal Council* [2010] 2 CLJ 821; [2009] 3 MLJ 452).

[27] When PETROS arrived into the LPG scene, representations were made by PETROS on behalf of the respondents to the applicant that the applicant would be collaborating with the respondents. The aforesaid letter from PETROSNiaga dated 6 November 2023 does not mention a monopoly to the exclusion of the applicant but instead informs that the applicant would

"continue its LPG business as usual whilst both parties engage in good faith discussion". It was submitted that "as usual" must mean the applicant's business in subsidised and unsubsidised gas.

[28] By a letter dated 15 July 2021, PETROS wrote to the applicant to express its interest in acquiring the LPG business of the applicant in Sarawak. By a letter dated 16 July 2021, the applicant replied to PETROS, informing them that the applicant has no interest in divesting their LPG business in Sarawak. The applicant's letter further states:

> On the other hand, we are more interested in the corporation and collaboration with PETROS in the other areas such as procurement of LPG, share filling facilities and logistic network in order to strengthen the LPG downstream business together and enhance consumer benefits in long term.

[29] In addition, it can be seen from the applicant's letter dated 22 September 2023 to the first respondent that even the portal for renewing the license, *ie*, https.//eutilities.sarawak.gov.my/ showed that both the license for the retail and supply of gas only expires on 27 June 2024, which is again consistent with the regular practice upon which the applicant's legitimate expectation arises. The applicant was in fact not able to submit for an online renewal of their license, which purportedly expires on 30 November 2023 because the portal did not allow them to do so.

[30] The applicant therefore submitted that the respondent's decision not to renew the license ought to be quashed as it would deprive the applicant of its right to continue supplying the subsidised LPG, which it has in the past been permitted by the respondent to enjoy and which the applicant can legitimately expect to be permitted to continue to do.

The Respondent's Failure To Respect And Recognise The Applicant's Legitimate Expectation Is So Unfair Such As To Amount To An Abuse Of Power

[31] It was submitted by the applicant that once a legitimate expectation is said to have arisen, the court's role is to consider what the applicant could legitimately expect, based on the circumstances. This was thoroughly considered by Lord Woolf MR in *R v. North And East Devon Health Authority, Ex Parte Coughlan (Secretary Of State For Health And Another Intervening)* [2000] 3 All ER 850.

[32] In this case, the applicant's legitimate expectation is of a benefit which is substantive, not simply procedural. The benefit granted to the applicant is the right to supply subsidised LPG, which is a substantive benefit as opposed to being procedural in nature. The letter from PETROSNiaga is explicit in that without the domestic or subsidised gas business, the applicant's business in Sarawak will be at an end in a matter of a short time. The respondent, through its impugned decision, has failed to respect and recognise the applicant's legitimate expectation.

[33] It was further submitted that the impugned decision made by the respondent to not allow the applicant to sell subsidised gas after 30 November 2023 frustrates the applicant's legitimate expectation in a manner which would be so unfair such as to amount to an abuse of power. The applicant submitted that the respondent's decision is so unfair such as to amount to an abuse of power for the following reasons:

(i) the applicant was invited to enter the Sarawak gas distribution market in 2013 when Shell Timur Sdn Bhd (STSB) could not operate the LPG supply business; and

(ii) the applicant had taken positive steps in making significant investments, based on the legitimate expectation that it would be able to continue supplying subsidised LPG in Sarawak.

[34] Furthermore, in considering the requirements of fairness, it is important to note that the applicant was not consulted nor was it given an opportunity to make representations to the respondent in respect of its impugned decision not to renew the applicant's licenses. This lends credence to the applicant's submission that the respondent had acted unfairly with regard to the applicant's legitimate expectation.

Respondent's Submission

[35] The respondent's counsel from the State Attorney General's Chambers had advanced the submissions, which may be summarised as follows.

Legitimate Expectation

[36] From the statutory statement and the affidavits filed by the applicant, its claim is anchored upon legitimate expectation that its license to supply and retail subsidised LPG would be renewed. The doctrine of legitimate expectation has been well-elucidated recently by Justice Amerjeet Singh Serjit Singh, after reviewing authorities of the appellate courts, in *Suriwong International Sdn Bhd v. Menteri Kewangan, Malaysia & Ors* [2023] CLJU 126; [2023] 1 LNS 126.

[37] The applicant has allegedly a substantive right of renewal of its license to sell subsidised LPG in Sarawak and the respondents are estopped from denying the applicant of this substantive right of renewal. Reference is made to the judgment of the Court of Appeal in *Hotel Sentral (JB) Sdn Bhd v. Pengarah Tanah Dan Galian Negeri Johor, Malaysia & Ors* [2017] 6 CLJ 161 that the expectation relied upon must be created by the public officials or authorities. Whether such an expectation exists or had been created is a question of fact.

[38] The respondents submitted that in this case, there was no evidence as follows:

(i) there was no representation made by either the Federal or State Government officers at the time when the applicant decided to take over the LPG business from STSB, a company controlled by a foreign company like the applicant, who could not continue operating the LPG supply and retail business in Sarawak, that license, which is for a maximum period of five years, issued to the applicant would be renewed. The applicant made its decision and undertook business risks to take over the LPG business from STSB, another foreign-owned company, without such misrepresentation or assurance from the respondents at all.

(ii) there was absolutely no evidence that the respondents gave any assurance or made any representation that license issued to the applicant under the Distribution of Gas Ordinance 2016 would be renewed.

(iii) no evidence has been furnished by the applicant that there was any assurance or representation from the respondents that the applicant can continue to sell LPG as price subsidised by the Government. In other words, no assurance or undertaking that the applicant would be selling subsidised LPG when it carries its own LPG business in Sarawak, and the applicant cannot have expectation that the Government will continue to subsidise the price of the LPG sold and supplied by the applicant.

(iv) in the premises, the applicant fails to discharge the burden of establishing there was a representation by the respondents or the Federal Ministry or officials that the applicant's license to sell LPG including subsidised LPG (which is for a fixed term not exceeding five years) would be renewed. Accordingly, its claim founded on legitimate expectation must fail.

[39] Further, the affidavits filed on behalf of the applicant do not state precisely the provisions in the Ordinance in which the respondents had acted *ultra vires*, or that the Ordinance expressly or by implication conferred on the applicant a right of renewal of its license to sell subsidised LPG, but acting contrary or in violation of the ambit of these provisions the respondents did not renew its license to sell subsidised LPG in Sarawak.

[40] The object of the Ordinance is stated in its long title as "an Ordinance to regulate the distribution of gas in Sarawak and for matters incidental thereto". This would include the incidental or ancillary power to decide who should be entitled to distribute gas in Sarawak, to accord opportunities for Sarawakians or Sarawak companies to be involved in the business of the distribution of gas, to properly manage and enforce the scheme for distribution of subsidised LPG for household and domestic use. Regulatory control of distribution of gas is through a licensing system provided in ss. 7 and 8 of the Ordinance and the licensing authority is the first respondent, Director of Gas Distribution Sarawak (refer s. 24(1) of the Interpretation Ordinance 2005 (Cap. 61)).

Decision Based On Public Policy

[41] It was submitted that the public policy that underpins the enactment of the Ordinance is the generation of more opportunities for Sarawakians and Sarawak companies to be involved in the distribution of gas, including subsidised LPG in Sarawak. The object of the Ordinance is to regulate the distribution of gas, including LPG, in Sarawak and the policy is through the passing of this Ordinance to provide more opportunities for Sarawakians and Sarawak companies to participate in the distribution of gas, including LPG, and in accordance with the decision of the Parliamentary Public Accounts Committee, to ensure that there is no abuse of the subsidy system.

[42] This public policy of providing Sarawakians and Sarawak companies opportunities to participate in the gas distribution industry in Sarawak was reiterated by the Minister for Utility and Telecommunication, Dato' Sri Haji Julaihi bin Haji Narawi, who said in the Dewan Undangan Negeri on 27 November 2023 as follows:

> PetrosNiaga adalah syarikat tempatan yang miliki oleh PETROS sebanyak 51% ekuitinya dan 49% milik PETRONAS Dagangan Berhad. Ini bermakna kedua-dua syarikat ini adalah Malaysian based company. Manakala MYGAZ Sdn Bhd adalah anak syarikat SIAM Gas yang merupakan sebuah syarikat pembakal Gas Petroleum Cecair (LPG) dari Thailand.
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> (Exhibit A-15 of Affidavit in Reply, Enclosure 18 at page 27).

[43] The decision not to renew the applicant's license to sell and distribute subsidised LPG is consistent with the public policy that more opportunities in the gas distribution business given to Sarawakians and Sarawak companies and that the management and control of the distribution and sale of subsidised LPG should be carried out through PETROS, a wholly owned State Government company.

[44] The allegation that the respondents want to force the applicant out of Sarawak is, on the evidence adduced by the applicant, baseless. The applicant can still sell unsubsidised LPG to hotels, laundries, factories and other commercial establishments, and a Ministerial statement was made in the State Legislature that MyGaz can still sell unsubsidised LPG. In fact, the respondents had wanted the applicant to continue its business in Sarawak, and this is amply illustrated in the letter dated 29 September 2023 from the first respondent to the applicant (see "exh. A1" – affidavit in support).

[45] The respondents submitted that the applicant if it wants to continue selling subsidised LPG can still do so in joint venture/partnership with PETROS, a Sarawak Government company. It is not disputed that Petronas Dagangan Sdn Bhd (PDB), a non-Sarawakian company, offered to form a joint venture/partnership with PETROS to undertake the business of

distribution of LPG in Sarawak including subsidised LPG. In fact, the evidence showed that the applicant had refused to work with Sarawak companies, like PETROS or PETROSNiaga, to meet the aspiration of the respondents for more Sarawakians and Sarawak companies to be involved in the distribution of gas industry. The applicant wants the Government to continue to subsidise the price of LPG, which it is selling predominantly in the urban areas of the State.

[46] This unreasonable stance of the applicant and public interest ought to be taken into consideration by this Honourable Court in deciding whether to grant the discretionary relief of *certiorari* sought herein by the applicant (refer *Khoo Ah Imm & Ors v. Datuk Bandar Kuala Lumpur & Anor* [1997] 3 CLJ 519).

Legality, Etc, Of The Impugned Decision

[47] The applicant also seeks a declaration that the impugned decision is illegal, null and void. It was submitted by the respondents that the Ordinance does not contain any provision which entitles the applicant as a matter of right to a renewal of its license to sell subsidised LPG. There is also no provision in the Ordinance that directs the first respondent to renew any license issued by him under s. 7 of the Ordinance. Therefore, by not renewing the license of the applicant, it could not be a breach of the Ordinance as alleged by the applicant.

Decision Upon Dictation Of The State Secretary

[48] The applicant asserts in his submission that the first respondent's impugned decision was made under the dictation of another authority. The applicant submits that the impugned decision to impose the terms and conditions was not the product of the Director's own mind but the product of dictation from the State Secretary as stated in an internal "memorandum from the Director of Economic Planning Unit to the State Director of Gas Distribution" ("the memorandum" – exhibited as SF8 to the affidavit in opposition (1) (encl. 20)).

[49] The respondents argued that the applicant filed a statutory statement (encl. 3) setting out the grounds upon which he seeks reliefs herein from the court. The grounds stated in the statutory statement did not assert that the impugned decision should be nullified as it was "a product of dictation from the State Secretary." In this regard, the applicant must be precluded from raising this ground to quash the impugned decision or to have it declared null and void.

Issue Of Bad Faith

[50] With regard to the issue of bad faith, the respondents have stated categorically that the applicant can still sell unsubsidised LPG and import LPG into Sarawak for sale. The respondents have decided that the applicant, which is majority-owned by Thai interests, who had for the last ten years

been selling LPG at prices subsidised by the Government should not continue to sell subsidised LPG. This would enable greater opportunities for Sarawakians and Sarawak companies to participate in the gas distribution business in Sarawak and to enhance the LPG distribution network so that the subsidised LPG is more readily available to the rural communities.

[51] Apart from that, the applicant applies for an order of *mandamus* to compel the respondents to issue or renew its license to sell subsidised LPG. The law on *mandamus* has been clearly stated in the judgment in *Karpal Singh Ram Singh v. Ketua Hakim Negara* [2011] 4 CLJ 179. Based on the above judgment, to succeed in its claim for *mandamus*, the applicant must prove that the respondents have a duty imposed by the Ordinance to renew its license to sell subsidised LPG and that the applicant has the legal right to enforce the performance of that duty prescribed by the Ordinance.

[52] The applicant who claims it has the legitimate expectation to have its license renewed cannot, by way of *mandamus* compel the respondents to perform their duty (where no such duty is imposed by the Ordinance) to renew the license, particularly as the applicant has failed to show it has the substantive, statutory or legal right to a renewal thereof. Further, whether an order of *mandamus* is to be issued is in the discretion of the court. In this instant, for the court to compel the respondents to renew the license for the applicant (a foreign-owned company) to sell LPG at prices subsidised by the Government, the respondents contended that it would be tantamount to the court directing the Government to provide subsidy for the LPG sold by the applicant in Sarawak and contrary to the stated policy of the State Government to increase opportunities for Sarawak companies to be involved in the business of gas distribution in the State.

Findings And Decision

[53] This court has considered the grounds of application as well as the affidavits filed and has analysed the written and oral submissions by both parties.

[54] Order 53 r. 2(4) of the ROC 2012 defines the type of conduct that could be challenged in judicial review proceedings, as follows:

> 2. Applications
>
> …
>
> (4) Any person who is adversely affected by the decision, action or omission in relation to the exercise of the public duty or function shall be entitle to make the application.

[55] A judicial review challenge would not lie against conduct that is held not to be justiciable (or reviewable) in the courts.

[56] Section 7 of the Ordinance is with respect to the licensing of activities relating to the distribution of gas in Sarawak. Those activities that require license to be issued by the Director of Gas, among others, the supply of gas and retail of gas (s. 7(f) and (g) of the Ordinance).

[57] Section 8 of the Ordinance empowers the Director to issue a license and to stipulate any terms and conditions therein lie in the sole and exclusive discretion of the first respondent, *ie*, the Director. The relevant parts of s. 8 reads:

> 8(1) A license to undertake any of the activities mentioned in section 7 shall be issued by the Director for such period and for any area of supply as may be stipulated in the license and upon terms and conditions as may be imposed by the Director.

Justiciability Of The Impugned Decision

[58] The counsel for the respondents submits that the impugned decision was made upon policy consideration to provide opportunities for Sarawakians and Sarawak companies to be involved in the business of gas distribution in Sarawak. That decision of non-renewal of the applicant's license to sell subsidised LPG, based on policy consideration, is non-justiciable or not subject to judicial review.

[59] Based on the chronology of events and the affidavit evidence, this court is of the view that the impugned decision of the first respondent was made following the policy decision or policy direction of the State Government of Sarawak to accord more opportunities for Sarawakian or Sarawak companies to be involved in the gas distribution business in Sarawak. This is in line with the statement of the then Minister for Public Utilities when introducing the Distribution of Gas Bill 2016 in the State Legislature on 21 November 2016 as follows:

> The State Government also wants to see the growth of the gas industry in Sarawak, with more Sarawak companies involved. All these efforts would not jeopardized Petronas' business and operations in the State but the State Government wants Petronas to be mindful of the aspirations and needs of Sarawakians and that it should operate in an environment where Petronas like all other parties involved in the gas supply industry are subject to State laws.
>
> *Tuan Speaker, the new law will come into force as soon as the regulatory structure for gas distribution in Sarawak is in place and the Director of Gas Distribution be appointed. With this new law more Sarawakians and Sarawak Companies would have the opportunities to participate in various business activities associated with the system of gas distribution in Sarawak.* (emphasis added)

[60] Consistent with the policy decision above, the State Government decided that the distribution of subsidised LPG should be controlled through Petroleum Sarawak Berhad (PETROS), a State Government company that

manages the subsidies for LPG sold to household consumers. As it was the State Government's policy decision, the policy decision or direction was implemented through the licensing process and procedure in which the first respondent, in his sole and exclusive discretion, is empowered to regulate under the Ordinance.

[61] The parties have agreed that the powers to issue a license and stipulate any terms and conditions in the license lies in the sole and exclusive discretion of the first respondent as stipulated under s. 8 of the Ordinance.

[62] The counsel for the applicant admitted that there exists a policy decision in respect of affording Sarawakian and Sarawak companies more opportunities to be engaged in the distribution of gas business in Sarawak. However, the applicant's counsel contended that the impugned decision made by the respondent is infirmed by illegality, irrationality, and procedural impropriety. The applicant submits that the impugned decision is not based on public policy but made based on the memo from the Director of EPU to the first respondent dated 4 February 2021 (exh. SF8 of the affidavit in opposition – encl. 15), which, according to the applicant is a dictation by the State Secretary to the first respondent. It is not in the sense that the Minister allowing Sarawakian and Sarawak companies to be more engaged in the gas business.

[63] This court has considered the arguments advanced by both parties on the issue of whether the decision of the respondents is a decision based on policy decision and thereby not amenable to judicial review.

[64] Based on the affidavits evidence, this court is of the considered view that the impugned decision of the first respondent was made pursuant to the policy direction that was decided by the State Government in respect of more opportunities for Sarawakian and Sarawak companies to be involved in the distribution of gas, including subsidised LPG in Sarawak. Unless the policy or action is inconsistent with the Constitution and the laws or arbitrary or irrational or abuse of power, the court will not interfere with such matters.

[65] In the present case, the respondents had clearly explained in their affidavits, why the decision was made not to grant license to the applicant beyond the date of 30 November 2023. Clearly, what was decided by the respondents hinged on matters relating to policy decision and thus this court would dissuade itself from entering into the realm which belongs to the Executive.

[66] In the landmark decision of *Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia* [2013] 2 CLJ 1009; [2013] 2 MLJ 321 ("*Dr Michael Jeyakumar*"), the Federal Court had in no uncertain term opined that the policy of the Executive is generally non-amenable to judicial review, and it is exclusively within the domain of the Executive as follows:

[16] We have no hesitation in accepting that the executive's discretion, whether by statute or prerogative is amenable to judicial review. However, whether such discretion is amenable to judicial review is dependent on the facts of each case (see *R Rama Chandran, Kumpulan Perangsang Bhd and Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625. It was generally held in those cases that not every decision of the executive could be subjected to judicial review.

[17] In the instant case, the Court of Appeal in dealing with the issue held that:

> In our view, and as implied in the notice of motion, there can be no doubt that the approval and disbursement of the fund involves an exercise of discretion. The DG and/or the director must evaluate the applications for the allocations. These applications can only be decided by the DG and/or the director in line with policy considerations and management prerogatives. The factual background did show that the appellants had approved the respondent's application amounting to RM1.72m, while other applications are being given consideration. The director has given practical suggestions to the respondent to channel relevant applications to relevant government agencies. In the process of evaluation, the DG and/or the director must comprehensively balance and safeguard the disbursement of the allocation, consistent with government policy and guidelines. Our courts do not possess the knowledge of policy considerations that underlie the decisions pursuant to the DG and/or the director's evaluation.

[18] We are in complete agreement with the above view. We would like to add that the disbursement of the Special Constituency Allocation is a policy matter which is not within the purview of the courts. It is our view that the courts are in no position to evaluate the qualifications in the application for the Special Constituency Allocation and to determine or decide on the policy made by the executive. We have to take cognisance of the fact that government policies emanate after consideration of a number of technical factors which are often non legal; and judges do not possess the necessary information and expertise to evaluate these non-legal factors and to pass judgment on the appropriateness or adequacy of a particular policy.

[19] In this regard, we would quote the relevant passages of the renown authors, MP Jain and SN Jain from their book entitled *Principles of Administrative Law* (6th Ed), at p 1069:

> It is not normally within the domain of any court to weigh the pros and cons of the policy or to scrutinize it and test the degree of its beneficial or equitable disposition for the purpose of varying or annulling it, based on howsoever sound and good reasoning,

except where it is arbitrary or violative of any constitution, statutory or any provision of law. When the government forms its policy it is based on a number of circumstance on facts, law, including constraints based on these resources. It is also based on its expert opinion, it would be dangerous if court is asked to test the utility, beneficiate effect of the policy or its appraisal based on facts set out on affidavits. The court would dissuade itself from entering into this realm which belongs to the executive (see *State of Punjab v. Ram Lubhaya Bagga*, AIR 1998 SC 1703). On matters affecting policy and requiring technical expertise, the court would leave the matter for decision of those who are qualified to address this issue. Unless the policy or action is inconsistent with the constitution and the laws or arbitrary or irrational or abuse of power, the court will not interfere with such matters (see *Federation of Railway Officers Assn v. UOI*, AIR 2003 SC 1344).

[20] In the present case, the second respondent had clearly explained why he decided the way he did with regard to the distribution of the Special Constituency Allocation for the Sungai Siput constituency. *Clearly, what was decided by the second respondent hinged on matters relating to policy and thus we would dissuade ourselves from entering into the realm which belongs to the executive. Courts must be wary of unduly extending its judicial arms to policy matters which are exclusively within the domain of the executive. Unwarranted usurpation and transgression by the judiciary into the realm of the executive and vice versa will bring about disrepute to our system of government which upholds the separation of powers between the three main components vis-à-vis the executive, the legislature and the judiciary.*

[21] Of course, in appropriate cases the courts as the custodian of law and justice must not remain idle. Where the policy or action of the executive is inconsistent with the Constitution and the law or in any manner arbitrary, irrational or there are elements of *mala fides* and abuse of power, the court is duty bound to interfere. Whether or not the court should interfere clearly depends on the facts and circumstances of each case. On the facts and circumstance of this case we are inclined to agree with the Court of Appeal that the decision of the first respondent and/or the second respondent is not amenable to judicial review. (emphasis added)

[67] The courts must be wary of unduly extending its judicial arms to policy matters exclusively within the Executive domain. Unwarranted usurpation and transgression by the Judiciary into the realm of the Executive and *vice versa* will bring about disrepute to our system of Government, which upholds the separation of powers between the three main components *vis-à-vis* the Executive, the Legislature, and the Judiciary.

[68] Whether or not the court should interfere clearly depends on the facts and circumstances of each case. On the facts and circumstances of this case, this court is inclined to agree with the submissions of the respondents that the decision of the respondents that hinges on policy decision is not amenable to judicial review.

Acting On Dictation

[69] On the issue that the first respondent was acting on dictation of the State Secretary or State Government, this court agrees with the counsel for respondents that such allegation was not specifically pleaded by the applicant in their statutory statement or affidavit in support of the application for judicial review.

[70] It is a requirement under O. 53 r. 3(2) of the ROC 2012 that the statutory statement filed by the applicant must be supported by a statement setting out grounds on which the relief is sought from the court. Therefore, the said ground of challenge should not be allowed to be relied on by the applicant in this application. This court is relying on the case of the Court of Appeal in *V Paul Raj Chelladurai v. Jabatan Telekom (M) Bhd & Ors* [2000] 4 CLJ 882; [2000] 3 MLJ 652 at p. 886 (CLJ); p. 656 (MLJ) which held:

> Under O. 53 r. 1(2) the application leave must be supported by a statement setting the name and description of the Applicant, the reliefs sought and the grounds on which it is sought. *Under O. 53 r. 3(1) no other grounds of reliefs other than those set out in the Statement shall be relied upon at the hearing of the originating motion on its merits.* (emphasis added)

[71] The decision not to renew or grant the applicant the license to distribute and supply subsidised LPG was validly made based on the sole and exclusive discretionary power of the first respondent after considering the appeal by the applicant. My view is that such a decision was made within the authority of the first respondent in accordance with the public policy and public interests to have more Sarawakian and Sarawak companies participating in the distribution of gas in Sarawak.

Legitimate Expectation

[72] On the ground of legitimate expectation by the applicant that its licenses to supply and retail subsidised LPG will be renewed or granted by the respondent beyond 30 November 2023, this court finds that the existence of the alleged expectation was not supported by any factual evidence or legal basis.

[73] There is no specific provision under the Ordinance that provides, as a matter of right, for renewal of the license upon its expiry. The applicant must apply to the respondent for the granting of the license to supply and retail subsidised LPG before the expiry of its license. Based on s. 8(1) of the Ordinance 2016, the Director, upon issuing the license, may impose terms and conditions. By not renewing a license, the applicant is exercising its discretionary power provided under the statute and therefore could not be said to have breached the Ordinance. Thus, there is no issue of *ultra vires* of s. 8 of the Ordinance by the first respondent.

[74] In the case of *Suriwong International Sdn Bhd v. Menteri Kewangan, Malaysia & Ors* (*supra*), as cited by the counsel for the respondents, it was held that:

> [29] An instructive exposition of the doctrine of legitimate expectation is found in the following statement of law enunciated by Simon Brown LJ in *R v. Devon CC ex.p Baker* [1995] 1 All ER 73 which was approved by the Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Berkerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65 in agreeing with the decision of the Court of Appeal on this point. Since then the statement of law, which is in the following words has been frequently quoted by our courts (omitting the case cited):
>
> > It is first, I think, conveniently to identify, at least in broad categories, various of the distinct senses in which the phrase 'legitimate expectation' is nowadays used:
> >
> > (1) Sometimes the phrase is used to denote a substantive right: an entitlement that the claimant asserts cannot be denied him … These various authorities show that the claimant's right will only be established when there is a clear and unambiguous representation upon which it was reasonable for him to rely. Then the administrator or other public body will be held bound by the representation made unless only its promise or undertaking as to how its power would be exercised is inconsistent with the statutory duties imposed upon it. The doctrine employed in this sense is akin to an estoppel. In so far as the public body's representation is held communicated by way of a stated policy, this type of representation falls into two distinct subcategories: cases in which the authority is held entitled to change their policy even so as to affect the claimant, and those in which they are not …
> >
> > (2) Perhaps more conveniently, the concept of legitimate expectation is used to refer to the claimant's interest in some ultimate benefit which he hopes to retain (or, some would argue, attain). Here therefore, it is in the interest itself rather than the benefit that is the substance of the expectation. In other words, the expectation arises not because the claimant asserts some specific right to a benefit but rather because his interest cannot be properly withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision …
> >
> > (3) Frequently, however, the concept of legitimate expectation is used to refer to the fair procedure itself. In other words, it is contended the claimant has a legitimate expectation that the public body will act fairly towards him;
>
> (4) The final category of legitimate expectation encompasses those cases in which it is held that a particular procedure, not otherwise provided by law in the protection of an interest, must be followed consequently upon some specific promise or practice. Fairness requires the public authority be held to it. The authority is bound by its assurance, whether given by way of a promise or implied by way of established practice.

[75] The decision not to grant any license beyond the date set by the respondents is in furtherance of the public policy of the State Government to make available more opportunities for Sarawakian and Sarawak companies to be involved in the distribution of gas in Sarawak. However, as submitted by the respondent and which is agreed by this court, the said policy does not prohibit the applicant from being granted a license in respect of the importation of LPG into Sarawak and to trade in non-subsidised LPG in Sarawak.

[76] In this court's opinion, the applicant itself failed to discharge the burden of establishing there was such a representation by the respondents or the Federal Ministry or officials that the applicant's license to sell LPG including subsidised LPG (which is for a fixed term not exceeding five years) would be renewed.

[77] Hence, this court agrees with the submission of the respondents that the impugned decision of the first respondent was not *ultra vires* or was acted in bad faith when making the said decision. The first respondent was not exercising his statutory powers to defeat the policy and object of the Ordinance. This court is also of the considered view that the impugned decision of the first respondent is not illegal, null and void as it was made consistent with the policy decision of the State Government and in accordance with the statutory powers provided under the Ordinance.

Conclusion

[78] Premised on the above, the applicant's application for the reliefs sought through this judicial review is dismissed with costs. After hearing both parties' submissions on the costs, this court awarded costs of RM30,000 to the respondents.